Phuah Beng Chooi @ Koh Kim Kee (P) & Ors v Koh Heng Jin @ Koh Heng Leong & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S6–22(24)–2261 OF 2001
ABDUL MALIK ISHAK J
16 OCTOBER 2006

Civil Procedure — Amendment — Order — Consent order — Whether court could amend its order after order was perfected and acted upon — Whether court was functus officio

The parties recorded a consent order dated 22 May 2006. The terms include that Henry Butcher Malaysia Sdn Bhd ('Henry Butcher') is to determine the valuation of the oil palm estates of St Andrew Estate (1986) and based on Henry Butcher's valuation, KPMG Chartered Accountants ('KPMG') will determine the respective amounts due to each of the vendors (referring to the plaintiffs', the fifth and the seventh defendants) which amounts shall constitute the 'respective purchase price' payable by the second defendant (Koh Heng Jin Holdings Sdn Bhd) as the purchaser. The respective purchase price 'shall be deemed to be conclusive determination of the respective purchase price to be paid by the purchaser to each of the vendors and the same shall be final and binding and shall not be the subject of any dispute or appeal in any manner whatsoever amongst all the parties herein.' The learned counsel for the plaintiffs was not happy with the valuation report of Henry Butcher and the accountant's report of KPMG. There was a disparity of RM16m between two valuation reports of Henry Butcher done on 29 May 2006 and Colliers Jordan done on 30 August 2001. The vendors filed a summons in chambers under O 92 r 4 of the Rules of the High Court 1980 to vary or set aside the consent order because of the disparity between the reports of the two valuers.

Held:

(1) Under its inherent jurisdiction, this court can at any stage of the proceedings, even after judgment, vary, modify or even extend its own order so as to express its intention and meaning correctly in order to ensure that the purposes of justice are not defeated. But here is a consent order drawn up by the parties and agreed to by the parties. It is binding and it serves as an estoppel. The court will not permit the person making a representation to go back on his word or allege a particular situation different from that which he represented. That would be the correct definition of estoppel as it is based on the enforcing of a representation (see para 35).

(2) Under s 68 of the Courts of Judicature Act 1964, there is certainly no room for the vendors to resile, renege or wriggle out of the solemn consent order.

The intention of the parties as expressed in the words employed in the consent order are plain and clear and that was to appoint a renown and professional valuers and accountants to conclusively determine the value of the price which the second defendant is to purchase the respective shares of the vendors and for the parties to be absolutely bound by their determination without dispute. The argument that the consent order is a conditional order is untenable and does violence to the clear words of the consent order. Of significance is this. That the consent order has been perfected and acted upon by Henry Butcher and KPMG and the parties themselves. This court is functus officio and it has no inherent power to vary or set aside a perfected order save and except for clerical slips (see paras 35, 41).

[Bahasa Malaysia summary

Pihak-pihak telah merekodkan satu perintah persetujuan bertarikh 22 Mei 2006. Terma-terma tersebut termasuk bahawa Henry Butcher Malaysia Sdn Bhd ('Henry Butcher') akan memastikan penilaian estet minyak kelapa sawit St Andrew (1986) dan berdasarkan penilaian Henry Buthcer, KPMG Chartered Accounts ('KPMG') akan menentukan amaun-amaun yang masing-masing kena dibayar kepada setiap penjual (merujuk kepada plaintif-plaintif, defendan kelima dan ketujuh) dimana amaun tersebut akan membentuk 'harga belian masing-masing' yang kena dibayar oleh defendan kedua (Koh Heng Jin Holdings Sdn Bhd) sebagai pembeli. Harga belian masing-masing 'akan dianggap sebagai penentuan konklusif harga belian untuk dibayar oleh pembeli kepada setiap penjual masing-masing dan akan menjadi muktamad dan mengikat dan tidak boleh dijadikan subjek sebarang pertikaian ataupun rayuan dalam apa juga cara di antara kesemu pihak-pihak di sini.' Peguamcara yang bijaksana plaintif-plaintif tidak berpuas hati dengan laporan penilaian Henry Butcher dan laporan akauntan KPMG. Terdapat perbezaan sebanyak RM16j di antara dua laporan-laporan penilaian tersebut iaitu Henry Butcher yang dinilaikan pada 29 Mei 2006 dan Colliers Jordan yang dinilaikan pada 30 Ogos 2001. Penjual-penjual memfailkan satu saman dalam kamar di bawah A 92 k 4 Kaedah-kaedah Mahkamah Tinggi 1980 untuk meminda atau mengetepikan perintah persetujuan tersebut yang disebabkan oleh perbezaan di antara laporan-laporan penilai-penilai tersebut.

Diputuskan:

(1) Di bawah bidang kuasa sedia ada, mahkamah ini boleh pada mana-mana peringkat prosiding, walaupun selepas penghakiman, meminda, mengubah ataupun menambahkan kepada perintahnya sendiri untuk membolehkannya menjelaskan niatnya dan maksudnya dengan betul supaya tujuan keadilan dapat dikekalkan. Akan tetapi, di sini perintah persetujuan telah dibuat oleh pihak-pihak dan dipersetujui oleh pihak-pihak. Ia adalah terikat dan bertindak sebagai estoppel. Mahkamah tidak akan membenarkan seseorang yang setelah membuat representasi gagal memenuhi janji yang telah dibuatnya ataupun mengatakan sesuatu situasi adalah berlainan daripada apa yang direpresentasikannya itu. Itu merupakan definasi estoppel yang betul oleh kerana ia berdasarkan penguatkuasaan satu representasi (lihat perenggan 35).

(2) Di bawah s 68 Akta Kehakiman Mahkamah 1964, tiada ruang untuk penjual-penjual berpaling, memungkiri ataupun keluar daripada perintah persetujuan tersebut. Niat pihak-pihak seperti yang dinyatakan di dalam perkataan-perkataan yang digunakan dalam perintah persetujuan tersebut adalah jelas dan nyata dan ia adalah untuk melantik penilai-penilai dan akauntan-akauntan yang profesional untuk memutuskan dengan konklusif nilai harga yang defendan kedua sepatutnya bayar kepada penjual-penjual tersebut masing-masing dan untuk pihak-pihak diikat secara mutlak oleh keputusan mereka tanpa pertikaian. Hujahan bahawa perintah persetujuan tersebut merupakan satu perintah bersyarat tidak dapat diterima dan melanggar perkataan-perkataan yang jelas perintah persetujuan tersebut. Apa yang penting ialah ini. Perintah persetujuan telahpun disempurnakan dan Henry Butcher dan KPMG dan juga pihak-pihak telah bertindak. Mahkamah ini menjadi functus officio dan tidak mempunyai kuasa sedia ada untuk meminda dan mengetepikan satu perintah yang telah disempurnakan kecuali ia merupakan kesilapan perkeranian (lihat perenggan 35, 41).]

Notes

For cases on amendment order, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 511–515.

Cases referred to

Abdul Razak Valibhoy & Anor v Abdul Rahim Valibhoy & Ors [1995] 2 SLR 555 (refd)
Allen v Bone (1841) 4 Beav 493 (refd)
Armstrong, Taylor and Whittaker v Oldham Corpn [1937] 2 All ER 577 (refd)
Atkinson v Abbott (1855) 25 LTOS 314 (refd)
Australian Broadcasting Commission v Australasian Performing Right Association Limited (1973) 129 CLR 99 (refd)
Bache & Co (London) Ltd v Banque Vernes Et Commerciale De Paris SA [1973] 2 Lloyd's Law Reports 437 (refd)
Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393 (refd)
Bangkok Bank Ltd v Cheng Lip Kwong [1990] 2 MLJ 5 (refd)
Bernard Rada & Lee v Concrete Innovators Co Pte Ltd & Anor [1995] 2 SLR 143 (refd)
Bird v Harris (1881) WN 5 (refd)
Cempaka Finance Bhd v Ho Lai Ying (trading as K H Trading) & Anor [2006] 2 MLJ 685 (refd)
Citibank NA v Ooi Boon Leong & Ors [1981] 1 MLJ 282 (refd)
Crossly v Crowther (1851) 9 Hare 384 (refd)
D & C Nomura Merchant Bankers Bhd v Gunung Kuari Sdn Bhd & 3 Ors [1990] 2 CLJ 58 (refd)
Dobbs v The National Bank of Australasia Limited (1935) 53 CLR 643 (refd)
FD Sassoon Inland Revenue Commissioners v Raphael, Re, Re RED Sassoon Inland Revenue Commissioners v Ezra [1934] All ER Rep 749
Friend v Young (1897) 2 Ch 421 (refd)
Gray, ex parte Incorporated Law Society, Re (1869) 20 LT 730 (refd)
Hincks, Re (1867) WN 291 (refd)
Hindmarsh, Re (1860) 1 Drew & Sm 129 (refd)
Hock Hua Bank Bhd v Chan Siew Yan [2005] 7 CLJ 62 (refd)

Hock Hua Bank Bhd v Sahari bin Murid [1981] 1 MLJ 143 (refd)
Inland Revenue Commissioners v Ezra [1934] All ER Rep 749 (refd)
Isaacs v Robertson [1985] AC 97 (refd)
Khaw Poh Chuan v Ng Gaik Peng & Ors [1996] 1 MLJ 761 (refd)
Moore v Prance (1851) 9 Hare 299 (refd)
Ng Kee Lin v Ooi Soon Eng [1978] 1 LNS 132 (refd)
Ooi Siew Yook & Ors v Lim Bar Kee [1987] 2 MLJ 267 (refd)
Oswald Hickson Collier & Co v Carter-Ruck [1982] 126 Sol Jo 120 (refd)
Owen v Ord (1828) 3 C & P 349 (refd)
Panglima Aces Sdn Bhd v Highway Brick Works (Serendah) Sdn Bhd [2006] 3 CLJ 628 (refd)
Pearlman (Veneers) SA (Pty) v Bernhard Bartels [1954] 1 WLR 1457 (refd)
Pioneer Shipping Ltd & Ors v BTP Tioxide Ltd The Nema [1981] 2 All ER 1030 (refd)
Prince Jefri Bolkiah v KPMG (a firm) [1999] 1 All ER 517 (refd)
Selvam Holdings (M) Sdn Bhd v Grant Kenyon & Eckhardt Sdn Bhd [2000] 3 MLJ 201 (refd)
Taylor & Whittaker v Oldham Corpn [1937] 2 All ER 577 (refd)
Thynne v Thynne (1955) P 272 (refd)
Tio Chee Hing v Tractors Malaysia Bhd [1973] 1 MLJ 66 (refd)
Tong Lee Hwa & Anor v Chin Ah Kwi [1971] 2 MLJ 75 (refd)
United Malayan Banking Corporation Bhd v Syarikat Perumahan Luas Sdn Bhd (No 2) [1988] 3 MLJ 352 (refd)
Watson v Woodman (1875) LR 20 Eq 721 (refd)
Wiggins v Peppin (1839) 2 Beav 403 (refd)
Wilson v Wilson (1820) 1 Jac & W 457 (refd)
Wooding, ex parte Coates & Hammond, re (1834) 3 Deac & Ch 626 (refd)
Yee Seng Plantations Sdn Bhd v Kerajaan Negeri Terengganu & Ors [2000] 3 MLJ 699 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 68
Legal Profession Act 1976 s 94(3)(d), (n)
Legal Profession (Practice And Etiquette) Rules 1978 rr 3, 4, 5(a), 5(b)(i)
Rules of the High Court 1980 O 1A, O 30, O 42 r 13, O 92 r 4

Ong Peck Ha (Cheng Poh Heng with him) (Ong & Ong) for the plaintiffs.
M Pathmanathan (Eric Clement with him) (M Pathmanathan & Co) for the first, second, third and sixth defendants.
Ho Kee Tong (Razlan Hadri with him) (Gan, Ho & Razlan Hadri) for the fifth and seventh defendants.

Abdul Malik Ishak J:

THE SESSION ON 22 MAY 2006

[1] Happily, the parties appeared before me and recorded a consent order in the following terms (see encl 74B):

CONSENT ORDER

UPON THIS APPLICATION via summons in chambers (encl 59) coming up for hearing this day in the presence of Ms Ong Peck Ha (Mr Cheng Poh Heng with her) solicitors for the plaintiffs, Dato' M Pathmanathan (Mr Eric Clement with him) solicitors for the first, second, third, fourth and sixth defendants and Mr Razlan Hadri, solicitors for the fifth and seventh defendants AND UPON HEARING counsel aforesaid, IT IS HEREBY ORDERED BY CONSENT THAT:

(i) the Second Defendant, Koh Heng Jin Holdings Sdn Bhd ('the Purchaser') do purchase the partnership equity of the first plaintiff Phuah Beng Chooi (6.98875%), the estate of Tan Theng (f) deceased (8.53659%), the estate of Koh Heng Lee @ Phuah Heng Khuan deceased (4.26830%) and the fifth defendant, Koh Yok Kwi @ Koh Geok Kooi (8.53659%)('the Vendors') in the partnership known as St Andrew estate (1986) ('the Partnership'); and

(ii) all the parties do appoint Henry Butcher Malaysia Sdn Bhd ('the Valuer') as the licensed valuer to value as at 22 May 2006 all the oil palm estates owned by the partnership comprising all those eight (8) pieces of land held under GM 27 Lot No 255, GM 28 Lot No 256, GM 29 Lot No 309, G 28029 Lot No 453, G 28030 Lot No 455 all in Mukim Batang Berjuntai and CT 22172 Lot No 1668, CT 22173 Lot No 1669 and CT 22174 Lot No 1670 all in Mukim Ijok ('the Oil Palm Estates') who shall complete the valuation and render a valuation report ('the Valuation Report') on or before 5 June 2006; and

(iii) all the parties do appoint KPMG Chartered Accountants ('the Accountants') as the Accountants for the purposes of:

  (a) ascertaining the net asset value of the partnership as at 22 May 2006 after taking into account, inter alia, the valuation of the Oil Palm Estates in the Valuation Report;

  (b) computing the amount due to each of the Vendors based on their respective share equity in the partnership which shall constitute the respective purchase price ('the respective purchase price') for the sale and purchase of the partnership share equity of each of the Vendors to the purchaser;

  and rendering the Accountants' Report ('the Accountants' Report') on or before 13 June 2006; and

(iv) the first defendant shall extend full cooperation and assistance and grant the Valuer access onto the Oil Palm Estates; and

(v) the first defendant shall extend full cooperation and assistance and make available to the Accountants the full and complete books of accounts of the partnership as at 22 May 2006 including record books and all documents requested by the Accountants to enable them to value the net asset value of the Partnership as at 22 May 2006;

(vi) the Valuer's and the Accountants' costs, expenses and disbursements incurred shall be borne by the purchaser and the vendors on a 50: 50 basis; and

(vii) the valuation report and the accountants' report shall be filed in these proceedings by 13 June 2006 and shall be deemed to be conclusive determination of the respective purchase price to be paid by the purchaser to each of the vendors and the same shall be final and binding and shall not be the subject of any dispute or appeal in any manner whatsoever amongst all the parties herein; and

(viii) all parties shall appear before the Honourable Court on 15 June 2006 for confirming and adopting of the respective purchase price as stated in the Accountants' Report as the Respective Purchase Price for the sale and purchase of each of the Vendor's respective

share equity in the Partnership to be paid by the Purchaser to the respective Vendors within three (3) months, with effect from 15.6.2006 and expiring on 15.9.2006 with an extension of two (2) months with interest at 6% per annum calculated on a daily basis on the amount outstanding; and

(ix) the Vendors shall execute valid and registrable Memoranda of Transfer and all other necessary and requisite documents to effect the transfer of all their share equity in the Oil Palm Estates to the second defendant and/or its nominee(s); and

(x) the Vendors shall cause the seventh defendant ie Chan Heng Chaik and all other relevant parties, if any, to execute valid and registrable memoranda of transfer and all other necessary and requisite documents to effect the transfer of all their beneficial shares in the Oil Palm Estates to the second defendant and/or its nominee(s);

(xi) the documents executed in items (ix) and (x) above ('the Transfer Documents') shall be deposited with M/s M Pathmanathan & Co on or before 18 June 2006 who are authorised to submit the Transfer Documents for adjudication and who shall release the same to the financier's solicitors in the event the Purchaser requires to charge the Oil Palm Estates or otherwise to present the Transfer Documents for registration upon payment of the Respective Purchase Price to the Vendors by the Purchaser on the completion or extended completion date;

(xii) all the Plaintiffs and Defendants do agree and consent to the Second Defendant charging to a financial institution the Oil Palm Estates for the purposes of obtaining financing to meet the payment of the full or part of the Respective Purchase Price; and

(xiii) the Vendors who have lodged or caused caveats to be lodged on the Oil Palm Estates shall execute and/or shall cause to be executed Withdrawal of Caveat Forms for the removal of the caveats lodged on the Oil Palm Estates; and

(xiv) the withdrawal of caveat Forms duly executed pursuant to item (xiii) above together with the requisite registration fee shall be deposited with Messrs M Pathmanathan & Co on or before 18 June 2006; and

(xv) the Vendors' solicitors, Messrs Ong & Ong of Suite 805, 8th Floor, City Plaza, Jalan Tebrau, 80250 Johor Bahru shall execute and deposit with Messrs M Pathmanathan & Co, the notice of discontinuance with no order as to costs and with no liberty to file afresh in Kuala Lumpur High Court Civil Suit No S3-22-3 of 2003 and Kuala Lumpur High Court Civil suit No D2-29-1697 of 2004 which shall be filed in Court upon payment of the respective purchase price; and

(xvi) the parties agree that they shall not commence any action and/or proceedings in Malaysia or elsewhere in connection with the subject matter of Kuala Lumpur Civil Action No: S22-(S24)-2261 of 2001, Kuala Lumpur High Court Originating Summons No S24-1352 of 2002, Kuala Lumpur High Court Summons No D5-22-1410 of 1990, Kuala Lumpur High Court Originating Summons No S6-24-1508 of 2001, Kuala Lumpur High Court Originating Summons No S4-24-1354 of 2002 and Kuala Lumpur High Court Originating Summons No S4-24-1639 of 2001; and

(xvii) the parties shall execute and do and take such steps as may be in their power to procure that all other persons, if any, shall execute all relevant documents, agreements, deeds and do all such acts and things as may be required so that full effect may be given to the provisions of this consent order;

(xviii) that the parties bear their own costs.

Dated the 22nd day of May 2006.

(T.T.) Sgd Illegible

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DEPUTY REGISTRAR

HIGH COURT MALAYA

KUALA LUMPUR

According to *Blackstone's Guide To The Civil Procedure Rules* (2nd Ed) at p 126:

> A consent order must be drawn up in the terms that have been agreed, must be expressed to be 'by consent' and must be signed by the legal representatives of all parties (or, if approved by the court, any litigant in person) affected by the order. Letters sent to the court by the parties signifying their consent to a draft order are sufficient. The order is then filed with the court, which will arrange for it to be sealed, entered in the court records, and sent out to the parties.

[2] In the context of the present case, I am dealing with a perfected consent order. It means that the consent order is not in its draft stage but it has been faired and sealed and so the consent order is perfected. It is a consent order that has been agreed to by the parties.

[3] According to the *Words And Phrases Legally Defined* (3rd Ed) under the general editorship of John B Saunders, the words 'consent order' carry the following connotations (see pp 314–315):

> CONSENT ORDER
>
> There is a great deal of difference between a consent order in the technical sense and an order which embodies provisions to which neither party objects. The mere fact that one side submits to an order does not make that order a consent order within the technical meaning of that expression.' *Chandless-Chandless v Nicholson* [1942] 2 KB 321 at p 324, per Lord Greene MR.
>
> The expression 'a consent order' may suggest some compromise or arrangement which might be inconsistent with the provisions of the Acts [Rent Restrictions Acts]. When the defendant is agreeing to submit to judgment because he is satisfied that the plaintiff can establish his right to an order under the Acts, it might be advisable to avoid the use of the word 'consent', which may have a wider meaning and cover cases where the 'consent' was the result of an arrangement which could not properly be made the basis of an order.' *Thorne v Smith* [1947] 1 All ER 39 at p 44, per Somervell LJ.
>
> We have had a discussion about 'consent orders'. It should be clearly understood by the profession that, when an order expressed to be made 'by consent', it is ambiguous. There are two meanings to the words 'by consent'. That was observed by Lord Greene MR in Chandless-Chandless v Nicholson]. One meaning is this: the words 'by consent' may evidence a real contract between the parties. In such a case the court will only interfere with such an order on the same grounds as it would with any other contract. The other meaning is this: the words 'by consent' may mean 'the parties hereto not objecting'. In such a case there is no real contract between the parties. The order can be altered or varied by the court in the same circumstances as any other order that is made by the court without the consent of the parties'.*Siebe Gormon & Co Ltd v Pneupac Ltd* [1982] 1 All ER 377 at p 380, CA, per Lord Denning MR

And the expression 'order by consent' has been defined in *Malayan Law Journal Words And Phrases Judicially Defined* at p 391 as follows

> Although an order by consent is not a contract, it is sufficient evidence of the contract upon which it is based, and such contract is not less a contract and subject to the incidents of a contract because there is superadded the command of a judge (see White Book 1962, Volume 1, p 2006.) In my view, this also applies to an interlocutory order obtained by consent. Since the present plaintiff is not personally a party to the consent order, it follows that he is not the proper party to apply for the declaration sought for in this case (see *Mohamad Salleh v Lau Siok Kee* [1974] 1 MLJ 102). Further, a judgment by consent is binding until set aside, and acts as an estoppel (see *Kinch v Walcott & Ors* [1929] AC 482). Being a stranger to the judgment, the plaintiff has no right to set it aside in his personal capacity (see *Kannappa Chettiar v Vellasamy Pillai* [1977] 1 MLJ 255 at p 256 per Mohamed Azmi J).

[4] The phrase 'consent judgment' in *Black's Law Dictionary* (7th Ed) with Bryan A Garner as the editor-in-chief carries the following caption at p 300 (see agreed judgment under JUDGMENT and at p 846, the words 'agreed judgment' has been defined to mean:

> A settlement that becomes a court judgment when the judge sanctions it. Also termed consent judgment; stipulated judgment.

[5] And at p 419 of the same dictionary, the expression 'consent decree' is defined as follows:

> A court decree that all parties agree to. Also termed consent order.

[6] The sum total of it all is this. That a consent order is binding and acts as an estoppel. According to *Jowitt's Dictionary of English Law* (2nd Ed) Vol 1 by John Burke, the word 'consent' connotes the following salient features (see p 422):

> Consent, an act of reason accompanied with deliberation, the mind weighing, as in a balance, the good or evil on either side. Consent supposes three things a physical power, a mental power, and a free and serious use of them. Hence it is that if consent be obtained by intimidation, force, meditated imposition, circumvention, surprise, or undue influence, it is to be treated as a delusion, and not as a deliberate and free act of the mind.

Continuing at the same page, the author states:

> In civil procedure, an order to which the parties consent cannot be appealed against except by leave (Judicature Act 1925, s 31 (1)(g)) but if the consent of any party is obtained by fraud or the like, the order may be set aside: in such a case there is in truth no consent. A consent may be withdrawn at any time before the order is perfected.

Thus, it can be surmised that a 'consent order' can only be set aside if the consent of any party is obtained by 'fraud, intimidation, force, meditated imposition, circumvention, surprise, and undue influence'. The list of reasons to set aside a consent order can never be exhaustive. It was a compromise to settle the matter, once and for all, between the parties. Just like the case of *Hock Hua Bank Bhd v Chan Siew Yan* [2005] 7 CLJ 62, 'there was no evidence of fraud, no evidence of duress and no evidence of any threat, inducement or promise in order to vitiate' the consent order in the present case at hand. The parties knew what they were doing. They deliberated and weighed everything in a fine balance. They knew the good, the bad and the ugly

sides of what they were doing. It is an 'express consent' and in the words of *Black's Law Dictionary* (7th Ed) by Bryan A Garner as the editor-in-chief, at p 300, the consent order here was clearly and unmistakably stated'. Any reasonable person reading the consent order in encl 74B would come to that conclusion. Incidentally, the consent order in encl 74B can also be found in encl 74M at pp 12–21 thereof.

WHAT IS THE PURPOSE OF THE CONSENT ORDER DATED 22 MAY 2006?

[7] It is for Henry Butcher Malaysia Sdn Bhd ('Henry Butcher') to determine the valuation of the oil palm estates of St Andrew Estate [1986] and based on Henry Butcher's valuation, KPMG Chartered Accountants ('KPMG') will determine the respective amounts due to each of the vendors (referring to the plaintiffs', the fifth and the seventh defendants) which amounts shall constitute the 'Respective Purchase Price' payable by the second defendant (Koh Heng Jin Holdings Sdn Bhd) as the purchaser. That would be the purpose of the consent order. It is as simple as that.

WHAT IS THE EFFECT OF THE CONSENT ORDER DATED 22 MAY 2006?

[8] The determination of the respective purchase price in the manner as alluded to above carries with it the following consequences which for bravado it shall be described as the final salvo that puts an end to the protracted and acrimonious disputes between the parties. The effect is this. That the respective purchase price *shall be deemed to be conclusive determination of the Respective Purchase Price to be paid by the purchaser to each of the vendors and the same shall be final and binding and shall not be the subject of any dispute or appeal in any manner whatsoever amongst all the parties herein.* Thus, the plain words employed by the three firms of solicitors expressed in the consent order do not admit any room for doubt or ambiguity about the true intention of the parties. It signals an end to the long outstanding disputes between the parties. It is a *court decree that all parties agree to*. And it is binding on all the parties hereto. The clear aim and object of the parties is to hold themselves honourably to be bound by the determination of Henry Butcher and KPMG. It must be emphasised that the determination of the respective purchase price was not to be *the subject of any dispute or appeal in any manner whatsoever amongst all the parties herein.* If the parties herein had intended that the reports of Henry Butcher and Kbe PMG to be otherwise than absolutely binding or that their determination would be challenged by the introduction of other reports, then the consent order could have provided for it. It is significant to note that the parties deliberately chose to crystallise their agreement in the form of a consent order and not in the form of a settlement agreement. This reflects the solemn intention of the parties to have the terms of the settlement to be communicated to the court and for the court to pronounce it as a consent order so that it carries the judicial force and efficacy of a court order. In short, the consent order sets out the entire agreement of the parties. It is a settled principle of construction that the intention of the parties is to be ascertained from the words used by the parties. So the duty of the court is to construe the words and expressions used by the parties and to give effect to them accordingly. Nothing less and nothing more. Lord Diplock in *Pioneer Shipping Ltd & Ors v BTP Tioxide Ltd The Nema* [1981] 2 All ER 1030, p 1035, aptly said that:

> The object sought to be achieved in construing any commercial contract is to ascertain what the mutual intentions of the parties were as to the legal obligations each assumed by the contractual words in which they (or brokers acting on their behalf) chose to express them; or, perhaps more accurately, what each would have led the other reasonably to assume were the acts that he was promising to do or to refrain from doing by the words in which the promises on his part were expressed

Words and expressions certainly play an important part in construing the intention of the parties. The court will not be in error if it construes the intention of the parties by giving effect to the words and expressions employed by them. In *Re FD Sassoon Inland Revenue Commissioners v Raphael, Re RED Sassoon Inland Revenue Commissioners v Ezra* [1934] All ER Rep 749, Lord Wright rightly said:

> It must be remembered at the outset that the duty of the court, while it seeks to give effect to the intention of the parties, must give effect to that intention as expressed, that is, it must ascertain the meaning of the words actually used.

I will not re-write the intention of the parties by adding words or expressions which are not there. That would amount to rectification and not construction. My duty is to construe the meaning behind those words employed in the consent order.

[9] The consent order sets out the following terms that have been agreed and these terms reflect the intention of the parties:

(a) for the appointments of Henry Butcher and KPMG (paragraphs (ii) and (iii) of the consent order);

(b) for the filing of the reports by Henry Butcher and KPMG by 13 June 2006 (para (vii) of the consent order);

(c) for the adoption of the respective purchase price by this court on 15 June 2006 (para (viii) of the consent order);

(d) for the payment by the purchaser (the second defendant known as Koh Heng Jin Holdings Sdn Bhd) to the vendors (referring to the plaintiffs, the fifth and the seventh defendants) of the respective purchase price by 15 September 2006 with an extension of two months at an interest of 6% per annum (para (viii) of the consent order);

(e) for the execution and deposit of the Transfer Documents with Messrs M Pathmanathan & Co, on or before 18 June 2006 (para (xi) of the consent order);

(f) for the deposit and withdrawal of the caveat forms by the vendors (referring to the plaintiffs, the fifth and the seventh defendants) with Messrs M Pathmanathan & Co, on or before 18 June 2006 (para (xiv) of the consent order);

(g) for the execution and deposit of the notices of discontinuance of Kuala Lumpur High Court Civil Suit No S3–22–3 of 2003 and Kuala Lumpur High Court Civil Suit No D2–29–697 of 2004 by Messrs Ong & Ong upon payment of the respective purchase price (para (xv) of the consent order);

(h) for the agreement by all parties not to commence with any action and/or proceedings in connection with the above subject matter in Malaysia or elsewhere (para (xvi) of the consent order); and

(i) for the agreement by all parties to bind themselves to do all such acts and things as may be required so as to give full effect to the consent order (para (xvii)).

THE SESSION ON 15 JUNE 2006

[10] By virtue of para (viii) of the consent order, all parties had to appear before this court for them to adopt the respective purchase price. The learned counsel for the plaintiffs in the person of Madam Ong Peck Ha from Messrs Ong & Ong was not happy with the valuation report of Henry Butcher and the accountant's report of KPMG. Her complaint was that the reports were not professionally done. This was what she said:

> Today is for the confirmation and adoption of the prices listed and I must say that the reports are insufficient and so nothing has come out of it. As much as they would like to adopt the professional reports, they say that the reports were unprofessionally done. A family dispute. We propose to resolve the dispute. We hope eventually to come to a settlement.

Dato' Pathmanathan for the first, second, third, fourth and sixth defendants objected vehemently to the change of heart of Madam Ong Peck Ha and to her request for an adjournment. He stressed that the consent order must be complied with.

[11] Mr Ho Kee Tong for the fifth and the seventh defendants let the cat out of the bag. He submitted that the second defendant (Koh Heng Jin Holdings Sdn Bhd) purchased the share from the third defendant (Koh Heng Huat @ Koh Heng Fat) based on a valuation report prepared by Colliers Jordan Lee & Jaafar (hereinafter referred to as 'Colliers Jordan') and the valuation of Colliers Jordan gave a higher value of the oil palm estates of St Andrew Estate (1986) as compared to that of Henry Butcher. In fact, before Madam Ong Peck Ha entered my chambers on 15 June 2006 (so I was told) she was shown the report of Colliers Jordan by Mr Ho Kee Tong and that prompted her to ask for an adjournment. I then adjourned the matter and fixed it for mention on 15 September 2006.

THE LETTER FROM DATO' PATHMANATHAN DATED 11 JULY 2006 AND THE SESSION ON 10 AUGUST 2006

[12] By letter dated 11 July 2006, Dato' Pathmanathan requested this matter to be brought forward to an earlier date and that letter was worded as follows (see exh 'KSK-4A' of encl 74K):

> 11 July 2006
>
> We refer to the above matter and in particular to item (viii) of the Consent Order dated 22 May 2006 which is to confirm and adopt the respective purchase price as stated in the accountants' report as the respective purchase price for the sale and purchase of each of the Vendors' respective share equity in the Partnership to be paid by the Purchaser to the respective Vendors within three months, with effect from 15 June 2006 and expiring on

15 September 2006 with an extension of two months with interest at 6% per annum calculated on a daily basis on the amount outstanding and which has been adjourned to 15 September 2006.

We shall be most grateful if the recording of the said item (viii) could be brought forward for the following reasons:

(1) We enclose herewith copies of:

(i) our letter dated 30 June 2006 addressed to Messrs Ong & Ong and Messrs Gan, Ho & Razlan Hadri respectively;

(ii) Messrs KPMG's ('the Accountant') letter dated 27 June 2006 and reply from Messrs Ong & Ong and Messrs Gan, Ho & Razlan Hadri both dated 30 June 2006; and

(iii) Messrs Henry Butcher Malaysia Sdn Bhd's ('the Valuer') letter dated 27 June 2006 and reply from Messrs Ong & Ong and Messrs Gan, Ho & Razlan Hadri both dated 30 June 2006. As evidenced by the above exchange of correspondence between the solicitors for the parties and the professionals, copies of which are enclosed herewith, there seems to be an attempt to exert pressure and influence on the professionals in connection with the computation of the respective purchase price which in accordance with the terms of the consent order are at all times valid and binding on the parties and the recording of the same pursuant to the said item (viii) is but a formality.

(2) In the meanwhile the adjudication of the Memoranda of Transfer cannot be proceeded with as the Parties concerned have failed and/or refused to execute and cause to be forwarded the same to us.

(3) The second defendant has secured financing for the payment and release of the respective purchase price to the respective Vendors in accordance with the terms of the consent order, which as a result of the adjournment would be delayed.

With all due respect we request this Honourable Court to bring forward the date for the recording of the respective purchase price under item (viii) of the consent order to the earliest available date as no useful purpose is being served in the interim.

Thank you.

Yours faithfully,

M PATHMANATHAN & CO

Advocates & Solicitors

c.c. (1) Messrs Ong & Ong

Solicitors for the plaintiffs

(2) Messrs Gan, Ho & Razlan Hadri

Solicitors for the fifth and seventh defendants

(3) Clients

Accordingly, I advanced the date earlier and I fixed it on 10 August 2006.

[13] On 10 August 2006, Dato' Pathmanathan expressed his concerns about the time frames and the datelines to be met in regard to the consent order. The said Dato' alluded to the fear that the consent order may be breached. Mr Cheng Poh Heng who

stood in for Madam Ong Peck Ha informed this court of the disparity between the two valuation reports of Henry Butcher and Colliers Jordan. Henry Butcher valued the oil palm estates of St Andrew Estate (1986) at RM26m while Colliers Jordan valued it at RM42m. A disparity of RM16m. No wonder Madam Ong Peck Ha complained that the reports of Henry Butcher and KPMG were 'unprofessionally done'. He informed this court that the vendors (referring to the plaintiffs, the fifth and the seventh defendants) had filed a summons in chambers to vary or set aside the consent order because of the disparity between the reports of the two valuers. Dato' Pathmanathan confirmed that he had received the vendors' summons in chambers.

ENCLOSURE 74F

[14] That summons in chambers can be found in encl 74F. It was filed on 4 August 2006 and there the vendors (referring to the plaintiffs, the fifth and the seventh defendants) sought for the following orders under O 92 r 4of the Rules of the High Court 1980 ('RHC'):

(a) That the consent order dated 22 May 2006 to be set aside and encl 59 be restored for hearing thereafter.

(b) Further from the order (a) above, the first defendant as the Managing Partner continue to distribute the profits from the partnership of St Andrew estate (1986) to all four parties namely estate of Tan Theng (f) deceased, estate of Koh Heng Lee @ Phuah Heng Khuan deceased, Phuah Beng Chooi @ Koh Kim Kee (f) and Koh Geok Kooi @ Koh Yok Kwi (f) for the year beginning 2006 and following.

(c) Liberty to apply;

(d) Costs of this application be costs in the cause;

(e) And/or other reliefs as this honourable court shall deem fit and just after the hearing of this application.

The grounds in support of the summons in chambers in encl 74F were set out therein and they were as follows:

(1) There is a conditional agreement couched into the consent order dated 22 May 2006 which contained a condition precedent which has to be fulfilled ie the respective purchase price must be determined, ascertained and confirmed and adopted before the sale and purchase can be proceeded with.

(2) The valuation of the properties conducted by Henry Butcher Malaysia Sdn Bhd has not been independently conducted and had been influenced by Koh Peng Guan, the heir apparent to the first defendant and he is also the shareholder and director of the second defendant purchaser company.

(3) Thus the valuation report on the value of the properties (which is RM16,700 per acre) is below the current market value and the vendors are not obliged to adopt and confirm the same as the value of the properties in their sale and purchase agreement.

(4) As the purchase price cannot be ascertained and agreed upon by both parties, the sale agreement become voidable for uncertainty in its main term (ie the sale price) and hence can be avoided by the vendors herein.

(5) The second defendant via the director and shareholder, Koh Peng Guan (also the son of the first defendant) did not come to court with clean hands and had acted mala fide in failing to produce an earlier 2001 valuation report conducted by Colliers Jordan Lee & Jafaar at the instructions of the director and shareholder, Koh Peng Guan.

(6) The valuation report of Henry Butcher Sdn Bhd is also flawed in many respects.

(7) In the result the valuation report on the net asset value of the partnership conducted by KPMG, which adopted the valuation of Henry Butcher Malaysia Sdn Bhd, is also flawed and further, it did not take into consideration many other calculations and sums due to the vendors by the management of the partnership.

(8) The first defendant (also Managing Director for the second defendant) failed to comply with order (v) in the consent order in not providing all the necessary books of accounts of the partnership to KPMG and hence the valuation report of KPMG is not accurate and inappropriate for the purpose herein.

(9) Without the adoption and confirmation of the respective purchase price the sale cannot be proceeded with without undue hardship on the vendors and in the result the rest of the terms of the sale and purchase contained in the consent order dated 22 May 2006 cannot be abided by.

(10) Hence, the consent order ought to be set aside for being interfered by the third party professionals engaged to do the valuation of the lands and/or assets and they have been strongly and adversely influenced by the director and shareholder of the second defendant ie Koh Peng Guan.

THE PRELIMINARY OBJECTION

[15] It is ideal to dispose off the preliminary objection before I proceed to adjudicate encl 74F. The preliminary objection may be stated in this way. That the law firm of Messrs M Pathmanathan & Co cannot represent the first, second, third, fourth and sixth defendants. The perceived basis for this disqualification is that Dato' Pathmanathan was a partner in the law firm of Messrs Yusof Lee Pathma & Marbeck in the year 1990 when a letter was written to a police station on behalf of the first plaintiff for a copy of a police report that the first plaintiff lodged against the first defendant. By reason of Dato' Pathmanathan having then been a partner of Messrs Yusof Lee Pathma & Marbeck ipso facto disqualifies him, so says the plaintiffs from acting for the first and the second defendants herein. The letter in question was dated 30 November 1990 and it can be found in exh 'PBC-1' to encl 74J and it was worded in this way:

YUSOF KHAN BIN GHOWS KHAN
LEE LIM HUAT
M PATHMANATHAN

TERRANCE S MARBECK
SANDRALEKA ASIRIAH
ELAIZA HANUM MERICAN
KUNG SUAN IM
S DEVANDRAN

YUSOF LEE PATHMA & MARBECK
PEGUAMBELA & PEGUAMCARA
ADVOCATES & SOLICITORS
Your Ref:
Our Ref
P.75/SA/sk/rj/lit
30hb. November, 1990
Ketua Polis Balai
Jalan Tun Razak
KUALA LUMPUR
DENGAN TANGAN

Tuan,

Per:

REPOT POLIS NO: 3364/90

Adalah kami dengan segala hormatnya merujuk perhatian tuan kepada perkara yang tersebut di atas. Surat kami kepada tuan bertarikh 21 November 1990 ada kaitannya.

Untuk makluman tuan, kami mewakili Puan Phuah Beng Chooi. Sukacita kiranya pihak tuan dapat membekalkan kami dengan satu salinan repot yang dinyatakan di atas dengan kadar yang segera kerana ia diperlukan untuk suatu kes mahkamah yang telah ditetapkan untuk sebutan pada 20hb. Disember 1009.

Kami bersedia membiayai sebarang kos yang berbangkit di dalam penduaan dan pengakuan sah repot tersebut.

Kerjasama dan perhatian awal tuan ke atas perkara ini sangat diharapkan dan amat kami hargai. Kami mendahuluinya dengan ucapan ribuan terima kasih.

Sekian.

Yang benar,

t.t. (Illegible)

s.k. Klien.

The abbreviation 'SA' that appears in the reference number refers to Sandraleka Asiriah, a legal assistant of the law firm of Messrs Yusof Lee Pathma & Marbeck then, and it was she who wrote that letter as reproduced above. According to the plaintiffs, it is immaterial that the legal assistant handled the matter and who was responsible

in writing that letter. It was said that the police report that was alluded to in the said letter related to an assault case which was a result of the same partnership dispute and that dispute is still unresolved to this day. It was said that Dato' Pathmanathan owed a fiduciary duty to the first plaintiff and that duty was said to have outlived the retainer.

[16] In advancing her preliminary objection further, the learned counsel for the plaintiffs emphasised that Dato' Pathmanathan as counsel for the second defendant here was a partner in the law firm of Messrs Yusof Lee Pathma & Marbeck who had acted then for the first plaintiff against the first defendant herein (the first defendant happens to be the managing director and controlling shareholder of the second defendant as the purchaser) in an assault case. In that assault case, the first defendant was found guilty under section 323 of the Penal Code and was fined. The medical report of the first plaintiff can also be seen in exh 'PBC-1' of encl 74J emanating from the Universiti Hospital and it was worded as follows:

> 11th January 1990
>
> MEDICAL REPORT ON
>
> Phuah Beng Chooi @ Koh Kim Kee
>
> F/49 yrs. NRIC 3914944
>
> UHRN/2-790901
>
> This 49 year old Chinese female was seen at Accident & Emergency Unit on 12 September 1989 at 1650 hrs. with complaints of pain over left cheek and giddiness. She alleged that she was assaulted by her brother-in-law at about 1500 hrs. on the same day. She alleged that she was assaulted with fist over her back and punched over her left face.
>
> She had no loss of consciousness. On examination, she was conscious, rational and alert. Vital signs were stable. She had a swelling over the left zygoma with local tenderness. Her vision, hearing and jaw movements were normal. She also had local tenderness over her right scapula region. An X-ray of the left zygoma showed no fractures.
>
> A diagnosis of soft tissue injury was made and analgesics were prescribed.
>
> She was also seen on 19 September 1989 at the surgical clinic. She had complained of persistent pain over her left cheek. She was examined and analgesic prescribed.
>
> t.t. (Illegible)
>
> Dr. Abdul Ali b. Raja Mohd.
>
> Medical Officer
>
> Department of Surgery.

Is it true that the fiduciary duty of Dato' Pathmanathan to the first plaintiff still persists? Is it true that that duty outlives the retainer that has since expired by effluxion of time? I would answer these two questions in the negative. To employ a counsel to act on your behalf is to retain the counsel to act for you. And that constitutes a retainer. It is in the nature of a contract of employment and like all contracts there should be an end to it. Of course, any person has the right to retain a counsel of his own choice provided that counsel is willing to act and is not

precluded by law or by statute from doing so (*Oswald Hickson Collier & Co v Carter-Ruck* [1982] 126 Sol Jo 120). It is desirable to have the retainer reduced into writing so that the terms are made clear between the parties (*Owen v Ord* (1828) 3 C & P 349; and *Armstrong, Taylor and Whittaker v Oldham Corpn* [1937] 2 All ER 577). It is quite common to hear that a written retainer has been revoked and a new one has been given (*Re Hincks* (1867) WN 291). If there is no evidence of a retainer, the court will rule that the counsel has acted without authority from his client (*Allen v Bone* (1841) 4 Beav 493; *Crossley v Crowther* (1851) 9 Hare 384; *Wilson v Wilson* (1820) 1 Jac & W 457; *Re Wooding, ex parte Coates and Hammond* (1834) 3 Deac & Ch 626; *Wiggins v Peppin* (1839) 2 Beav 403; *Atkinson v Abbott* (1855) 25 LTOS 314; *Re Gray, ex parte Incorporated Law Society* (1869) 20 LT 730; *Bird v Harris* (1881) WN 5; and *Moore v Prance* (1851) 9 Hare 299). Here, I am not shown of any written retainer between the first plaintiff and the law firm of Messrs Yusof Lee Pathma & Marbeck. The letter written by the legal assistant as reproduced earlier was not a written retainer. If there was no written retainer between the first plaintiff and the law firm of Messrs Yusof Lee Pathma & Marbeck, what is there to prevent Dato' Pathmanathan from now acting for the first, second, third, fourth and sixth defendants? Even if there was a written retainer between the first plaintiff and the law firm of Messrs Yusof Lee Pathma & Marbeck, the relationship would be like an agent and a principal and time will definitely run and has run against the first plaintiff as the client (*Re Hindmarsh* (1860) 1 Drew & Sm 129; *Watson v Woodman* (1875) LR 20 Eq 721; and *Friend v Young* (1897) 2 Ch 421 at p 432). Here, there was no allegation that Dato' Pathmanathan held any confidential documents pertaining to the assault case nor was there any allegation that he was privy to certain confidential information in regard to the assault case that has a bearing to the present case at hand nor was there any averment that he witnessed the assault so as to make him out as a witness in that case. Here too there was no allegation of any conflict of interest except to say that there was one. With all these unsatisfactory state of affairs, the plaintiffs' contentions must therefore be held to be unfounded. It is my judgment that there is no basis whatsoever to allege any conflict of interest. Indeed there is not even any allegation of any possible breach of confidentiality. It can hardly be contended that just because of a single letter written by the legal assistant to a police station some 16 years ago asking for a copy of the police report lodged by the first plaintiff, the law firm of Messrs M Pathmanathan & Co cannot now act for the first and the second defendants. In my judgment, there is no reasonable nexus or causal link between the present suit and the request for a copy of the police report in the assault case. At any rate, on the strength of the affidavit that was affirmed by the third plaintiff (Koh Siew Kuan (P)) on 22 August 2006 as seen in encl 81, there was an admission that negotiations had already taken place with the then erstwhile solicitors Messrs SK Yeoh & Partners and the singular outstanding issue was the choice of valuers and accountants which was a matter to be agreed upon jointly by all the parties. How then by any stretch of the imagination, one may ask, can it be said that Messrs M Pathmanathan & Co, are in a position of conflict, embarrassment or continuing to hold and be in a fiduciary obligation right up till today? It is my judgment that neither the law firm of Messrs M Pathmanathan & Co, nor Dato' Pathmanathan himself are in any way in breach of rules 3, 4, 5(a) and 5(b)(i) of the Legal Profession (Practice And Etiquette) Rules 1978. There is no 'misconduct' on the part of Dato' Pathmanathan when he acted for the first, second, third, fourth and sixth defendants in arguing this present case before me. It is mischievous to even

A B C D E F G H I

suggest that Dato' Pathmanathan has breached s 94(3)(d) and (n) Legal Profession Act 1976. In my judgment, the attempt to disqualify and preclude Dato' Pathmanathan from representing the first, second, third, fourth and sixth defendants is actuated by malice and lack of bona fides. Incidentally, the legal assistant has long ceased practice and has emigrated to New Zealand (see para 23.1 of the affidavit of the first defendant that was affirmed on 15 August 2006 as seen in encl 74M). Dato' Pathmanathan too has not taken a single criminal brief in his entire practice. The present action involves a partnership dispute and has no nexus whatsoever with the assault case which Dato' Pathmanathan did not handle. It is certainly preposterous to even suggest that the said Dato' owes a fiduciary duty that outlives the assault case and that he is now forever precluded from taking a brief against the first plaintiff under these circumstances.

[17] It has not been suggested that Dato' Pathmanathan has put up 'Chinese walls' surrounding the assault case so that he can handle the present case at hand. Lord Millett writing for the House of Lords in *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 1 All ER 517 recognised 'the effectiveness of Chinese walls as a means of restricting the movement of information between different departments of the same organisation'. Here, the vendors (referring to the plaintiffs, the fifth and the seventh defendants) were most unhappy about the valuation report of Henry Butcher. But they forgot that valuation is not an exact science. Dato' Pathmanathan is certainly entitled to represent his clients in this case before me. There are no two ways about it.

TO THE HEART OF THE MATTER

[18] The sessions on 18 August 2006, 30 August 2006, 1 September 2006, 4 September 2006, 5 September 2006, 6 September 2006, 7 September 2006 and 8 September 2006 were all centred on the summons in chambers in encl 74F. The parties argued to their hearts content and many issues were raised. I shall now highlight some of the salient ones.

(a) The inherent jurisdiction of the court

[19] The vendors (referring to the plaintiffs, the fifth and the seventh defendants) hinged their application to set aside the consent order on the inherent jurisdiction of this court under O 92 r 4 of the RHC. The sealed consent order was duly served on the solicitors for the plaintiffs on 12 July 2006 (except the fifth and the seventh defendants). The application to set aside the consent order as per the summons in chambers in encl 74F was filed on 4 August 2006 and it was well within the thirty days from the service of the same on the plaintiffs and, thus, it is regular (O 42 r 13 of the RHC). I was asked to set aside the consent order for the following reasons:

(i) the disparity between the valuation done by Henry Butcher with that of Colliers Jordan came up to RM16m;

(ii) the comparables utilised by Henry Butcher were in the districts of Lipis (located at Budu Estate, 15 km from Bandar Lipis), Rompin (located at Ladang Cempaka Keratong, Rompin), Hulu Selangor (located between the

boundary of Selangor and Perak), Jempol (located at Negeri Sembilan), Temerloh (located at Pahang), and Kuala Lipis (located at Pahang) and they were all very far away from the subject property;

(iii) the valuation done by Henry Butcher was carried out on 29 May 2006;

(iv) the comparables utilised by Colliers Jordan were Rantau Panjang Estate (in the Mukim of Batang Berjuntai) and Sungai Rambai Estate (in the Mukim of Ijok, Pasangan and Batang Berjuntai) and they were within the vicinity of the subject property;

(v) the valuation done by Colliers Jordan was on 30 August 2001;

(vi) the valuation by the Inland Revenue of the market value dated 10 August 2006 as seen at exhibit 'KSK-8' of encl 80 gave a figure of RM35,000 per acre and this would place the oil palm estates of St Andrew Estate (1986) at RM52.6m;

(vii) a sale and purchase agreement dated 24 March 2003 was entered into between the third defendant and the second defendant for the sum of RM5,400,000 using the valuation report of Colliers Jordan as a basis;

(viii) the valuation report prepared by Colliers Jordan and the sale and purchase agreement as alluded to in para (vii) were within the knowledge of the first and the second defendants yet this fact was not made known to the vendors (referring to the plaintiffs, the fifth and the seventh defendants); and

(ix) that the subject property (the oil palm estates of St Andrew Estate (1986)) was grossly undervalued by Henry Butcher whose report was not in accordance with the Malaysian Valuation Standards.

[20] I was also asked to be magnanimous and be emboldened for the purpose of doing justice in the instant case. It was emphasised that this court neither needs justification nor hesitation to do justice. The learned counsel for the plaintiffs urged me to invoke O 1A of the RHC and despatch justice expeditiously. Order 1A of the RHC states as follows:

> In administering any rules herein, the court or judge shall have regard to justice of a particular case and not only to the technical non-compliance of any of the rules herein.

I am acutely aware, that under its inherent jurisdiction, this court can at any stage of the proceedings, even after judgment, vary, modify or even extend its own order so as to express its intention and meaning correctly in order to ensure that the purposes of justice are not defeated (*Thynne v Thynne* (1955) P 272, and *Pearlman (Veneers) SA (Pty) v Bernhard Bartels* [1954] 1 WLR 1457, [1954] 3 ALL E.R. 659.). But here, I am dealing with a consent order drawn up by the parties and agreed to by the parties. It is binding and it serves as an estoppel. The court will not permit the person making a representation to go back on his word or allege a particular situation different from that which he represented. That would be the correct definition of estoppel as it is based on the enforcing of a representation. Yet the vendors (referring to the plaintiffs, the fifth and the seventh defendants) are at setting it aside. I decline to set aside the consent order for the reasons as set out in this judgment.

(b) The Courts of Judicature Act 1964 (Act 91)

[21] Section 68 of the Courts of Judicature Act 1964 (Act 91) enacts as follows:

> 68. Non-appealable matters
>
> (1) No appeal shall be brought to the Court of Appeal in any of the following cases:
>
> (b) where the judgment or order is made by consent of parties.

There is certainly no room for the vendors (referring to the plaintiffs, the fifth and the seventh defendants) to resile, renege or wriggle out of the solemn consent order. There is no avenue to manouevre. The terms of the consent order were settled by the solicitors for the parties after a very careful consideration and with a view to bringing to a final conclusion the long standing and protracted disputes in the several consolidated suits. As the disputes had been prolonged with no resolution in sight the parties agreed that the only way to resolve the disputes was for the second defendant to purchase the shares of the vendors (referring to the plaintiffs, the fifth and the seventh defendants) at a price to be independently determined by KPMG based on the valuation report prepared by Henry Butcher. The choice of Henry Butcher was solely that of the vendors (referring to the plaintiffs, the fifth and the seventh defendants). The intention of the parties as expressed in the words employed in the consent order are plain and clear and that was to appoint a renown and professional valuers and accountants to conclusively determine the value of the price which the second defendant is to purchase the respective shares of the vendors (referring to the plaintiffs, the fifth and the seventh defendants) and for the parties to be absolutely bound by their determination without dispute. The language and the time frames agreed by the parties do not permit any room for challenge, variation or setting aside. All the respective solicitors were personally present before me on 22 May 2006 and they wholeheartedly confirmed the terms of the consent order. The language employed in the consent order are unequivocal, plain, clear and admit no ambiguity whatsoever. The argument that the consent order is a conditional order is untenable and does violence to the clear words of the consent order. Of significance is this. That the consent order has been perfected and acted upon by Henry Butcher and KPMG and the parties themselves. KPMG 's report can be seen in exh 'KSK-7' of encl 74K and they are worded as follows:

> KPMG
>
> KPMG (Firm No. AF 0758) Chartered Accountants Wisma KPMG Jalan Dungun, Damansara Heights 50490 Kuala Lumpur, Malaysia
>
> High Court of Malaya Our ref A7/HLLS/NYP/lkt Wisma Denmark 36 Jalan Ampang Contact Hew Lee Lam Sang 50450 Kuala Lumpur Ext 2012 Malaysia
>
> 13 June 2006
>
> Dear Sirs
>
> St Andrew Estate (1986)
>
> Professional services pursuant to the Court Order dated 22 May 2006 (Civil Action No. S22-(S24)-2261 OF 2001) for the calculation of net assets value of St. Andrew Estate (1986) ('the Estate') as at 22 May 2006

We refer to the Court Order dated 22 May 2006 whereby we have been jointly appointed by Messrs. Ong & Ong, Messrs. M. Pathmanathan & Co and Messrs Gan, Ho & Razlan Hadri, all Advocates & Solicitors, to calculate the net assets value per shareholding of the Estate as at 22 May 2005 for the submission to the High Court of Malaya at Kuala Lumpur.

The net assets value of the Estate as at 22 May 2006 was arrived at based on the management accounts provided by the first defendant, Koh Heng Jin @ Koh Heng Leong after taking into account the market value of the Oil Palm Estates in the Valuation Report dated 29 May 2006 provided by the independent professional valuer, Henry Butcher Malaysia Sdn. Bhd. The calculation of the net assets value per shareholding is in accordance to the basic distribution percentage (%) stated in the Partnership's agreement. We stressed that the calculation of the net assets value per shareholding do not constitute either an audit or a review made in accordance with International Standards on Auditing.

We report our findings in Appendix 1.

Our report is intended solely for the submission to the High Court of Malaya at Kuala Lumpur by the Partners of the Estate and is not intended for use by those who have not agreed to the procedures and taken responsibility for the sufficiency of the procedures for their purposes. If you request that additional specified users of the report be added, we will require that they acknowledge, in writing, their agreement with the procedures and their responsibility for the sufficiency of the procedures for their purposes.

Yours faithfully Sgd (Illegible) KPMG Date: 13 June 2006

KPMG

St. Andrew Estate (1986) 13 June 2006 Appendix 1

The Share of Net Assets of St Andrew Estate (1986) As at 22 May 2006

The net assets value at 22 May 2006 is as follows:

Net assets value per management accounts RM12,640,346

Revaluation surplus derived from valuation of the Oil Palm Estates by Henry Butcher Malaysia Sdn. Bhd. in accordance to the Valuation Report dated 29 May 2006 RM13,695,649

Total RM26,335,995

	BASIC DISTRIBUTION	SHARE OF NET ASSETS
	%	RM
KOH HENG JIN HOLDINGS SDN BHD	62.00747	16,330,284
ESTATE OF TAN THENG (DECEASED)	8.53659	2,248,196
KOH GEOK KOOI	8,53659	2,248,196
KOH HOOI CHEOW REALTY SDN BHD	7.78612	2,050,552

PHUAH BENG CHOOI @ KOH KIM KEE	6.98875	1,840.557
KOR THIAM SZE	1,87618	494,111
ESTATE OF KOH HENG LEE (DECEASED)	4.2683	1,124.099
TOTAL	100	1,124.099

[22] It is difficult to find more clear words than that as expressed in the consent order. The parties and their solicitors had spared no efforts to make the intention of the parties abundantly clear. And yet, in spite of all that precaution, the vendors (referring to the plaintiffs, the fifth and the seventh defendants) have been advised by their solicitors and would have this court believe that the parties are at liberty by virtue of encl 74F to challenge the consent order and have it set aside. I beg to disagree.

[23] If such were the law then it is an invitation to abuse the process of the court. Court orders consented to by the parties with the benefit of legal advice will no longer be obeyed willy-nilly and be sacrosanct but will be disputed and challenged with impunity for the most frivolous reasons. The sanctity of the consent order here must be preserved at all costs.

[24] The vendors (referring to the plaintiffs, the fifth and the seventh defendants) do not contend nor argue that the consent order was a mistake or obtained by fraud, coercion or collusion. In fact, they admit that there was no mistake or fraud and that it was entered into voluntarily and with full knowledge of the legal consequences. Henry Butcher and KPMG have not alleged nor complained of any interference or undue influence in the discharge of their professional duties independently in accordance with the consent order. There is a letter dated 21 May 2006 emanating from the purchaser's solicitors which was written on the eve of the entering of the consent order where the express consent of the parties was appended to the draft consent order. That letter was worded as follows (see exh 'KHJ-2' of encl 74M):

M PATHMANATHAN & CO

Peguambela & Peguamcara / Advocates & Solicitors

Our Ref: K.213/P/hw(lit)

Your Ref:

21 May 2006

(1) 1. Mr. Koh Heng Jin @ Koh Heng Leong

(2) 2. Koh Heng Jin Holdings Sdn Bhd

(3) 3. Mr. Koh Heng Huat @ Koh Heng Fat

(4) 4. Koh Hooi Cheow Realty Sdn Bhd

(5) 5. Mr. Koh Thiam Sze

all at c/o St. Andrew's Estate

No. 7, Jalan Semarak

54100 KUALA LUMPUR

Dear Sirs,

Re: Kuala Lumpur Court C.S. No: S22(24)-2261-2001 & 5 other suits

Phuah Beng Chooi @ Koh Kim Kee and 2 Ors v Koh Heng Jin @ Koh Heng Leong and 6 Ors

We confirm your definite and irrevocable instructions that you are agreeable to enter consent judgment as per the annexed draft which we have settled with Messrs Ong & Ong, solicitors for the Plaintiffs and Messrs Gan, Ho & Razlan Hadri, solicitors for the 5th and 7th Defendants.

We shall attend court tomorrow and record the same. You will be bound by the terms of the said consent order as the same is non-appealable. We have advised you that the valuation by Henry Butcher Malaysia Sdn Bhd ('the Valuer') and KPMG Chartered Accounts ('the Accountants') of the nett asset value cannot be challenged and you understand and agree to be bound by the same.

Kindly signify your consent in the draft consent order.

Thank you.	Sgd (Illegible)	Sgd. (Illegible)
	(Chinese characters)	KOH HENG JIN HOLDINGS SDN BHD
Yours faithfully,	Sgd (Illegible)	Sgd. (Illegible)
Sgd ((Illegible)	(Chinese Characters)	...
		Managing Director
		KOH HOOI CHEOW REALTY SDN BHD
		Sgd. (Illegible)
		...
		Managing Director

[25] And it establishes beyond per adventure that the parties were under no illusion as to the binding and non-challengeable nature of the consent order and the sale price that was to be determined by Henry Butcher and KPMG. Indeed there were other correspondences for Madam Ong Peck Ha as seen in exhibits 'KHJ-3', 'KHJ-4', 'KHJ-5', 'KHJ-6' and 'KHJ-7' annexed to encl 74M which showed the same line of thinking.

[26] Having agreed to the terms of the consent order, all the vendors (referring to the plaintiffs, the fifth and the seventh defendants) and their solicitors should not be permitted to ferment discord and re-agitate litigation. The valuation report of Henry Butcher and the accountant's report of KPMG are the conclusive determination of the respective purchase price and is final and binding and cannot be disputed or appealed. All the parties knew and understood the meaning and consequences of the consent order. It is correct to say that the parties and their solicitors were under no

illusion or doubt as to the nature, effect and consequences of the consent order. The summons in chambers in encl 74F to challenge the consent order and to set it aside must be held to be frivolous, vexatious and an abuse of the process of this court. Enclosure 74F militates against the very purpose of the consent order. The very solicitors who had advised the applicants in encl 74F about the binding, conclusive, non-disputable and non-appealable nature of the consent order are now advising the vendors (referring to the plaintiffs, the fifth and the seventh defendants) that the consent order is challengeable and it is not what it says.

(c) The Court is Functus Officio

[27] I must reiterate that the consent order has been perfected and this court is functus officio and it has no inherent power to vary or set aside a perfected order save and except for clerical slips. Put in another way, once a court has pronounced an order, consent or otherwise, and the same is drawn up, faired and perfected the court is functus officio and the order cannot be altered, amended, varied or set aside except to correct mistakes or slips in expressing the intention of the court. If it is not a consent order, then the only recourse is by way of an appeal. If it is a consent order, like the present case at hand, there is no recourse to an appeal; the only recourse is to file a fresh action in order to impeach the consent order and that too in very limited circumstances.

[28] Again, I must reiterate that a consent order cannot be set aside except by a fresh action. It can only be done in a fresh action if the consent was not free or vitiated by reason of fraud, coercion, undue influence, etc. In *Tong Chong Fah v Chin Ah Kwi* [1971] 2 MLJ 75, Gill FJ writing a separate judgment had this to say of a judgment by consent (see pp 79–80 of the report):

> After a judgment by consent has been passed and entered, it cannot afterwards be varied on the ground of mistake, except for reasons sufficient to set aside an agreement (see *Attorney-General v Tomline* (1877-8) 7 Ch D 388). The general rule is that after a judgment has been passed and entered, even where it has been taken by consent and under a mistake, the court cannot set it aside otherwise than in a fresh action brought for the purpose unless (a) there has been a clerical mistake or an error arising from an accidental slip or omission, or (b) the judgment as drawn up does not correctly state what the court actually decided and intended to decide, in either of which cases the application may be made by motion in the action (see *Ainsworth v. Wilding* (1896) 1 C 673). The same rule must apply, a fortiori, where the parties have entered into an agreement in pursuance of the terms of settlement embodied in the consent order.

Ali FJ also writing a separate judgment, aptly said at p 81 of the report:

> The question here is whether a party to a settlement has the right to apply to vary a consent order. In *In re South American and Mexican Company, Ex parte Bank of England* (1895) 1 Ch. 37, Vaughan Williams J. said on p 45:
>
> '…It has always been the law that a judgment by consent or by default raises an estoppel just in the same way as a judgment after the court has exercised a judicial discretion in the matter. The basis of the estoppel is that when parties have once litigated a matter, it is in the interest of the estate that litigation should come to an end; and if they agree upon a result, or upon a verdict, or upon a judgment, or upon a verdict and judgment, as the case

may be, an estoppel is raised as to all the matters in respect of which an estoppel would have been raised by judgment if the case had been fought out to the bitter end' A

Jenkins v Robertson LR 1 HL Sc 117 was referred to as an exception to the general rule inasmuch as it was a decision on the law of Scotland and not a decision on the general law of the land. Vaughan William J's. decision was affirmed by the Court of Appeal. Lord Herschell LC delivering the main judgment said on p 50: B

The truth is, a judgment by consent is intended to put a stop to litigation between the parties just as much as is a judgment which results from the decision of the court after the matter has been fought out to the end. And I think it would be very mischievous if one were not to give a fair and reasonable interpretation to such judgments, and were to allow questions that were really involved in the action to be fought over again in a subsequent action. I think, therefore, the judgment should be affirmed, and the appeal dismissed with costs.' C

That, in my judgment, should be sufficient to dispose of the question whether or not the learned judge in this case had the power to vary the consent order of 15 December 1969. D

[29] Furthermore, I must reiterate that all orders whether by consent or otherwise, once drawn up and perfected cannot be set aside because the court is said to be functus officio. The exception is under the slip rule or if the order is by default, ex parte or otherwise, made in the absence of the other party. The headnotes to the case of *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143 should be referred to. There, it was digested as follows: E

In this case the learned judge had made an order for sale in a foreclosure proceeding. The order was made after hearing all the parties and was made despite a claim of non est factum and allegations of fraud and forgery by the respondent. The order was drawn up and perfected. There was no appeal against it. The respondent applied to set aside the judgment and this application was refused. Subsequently, the respondent applied again to set aside the previous orders. The learned judge thereupon set aside his order. The appellant appealed. F

Held: (1) the learned judge was functus officio:

(2) the court had no power under any application in the same action to alter vary or set aside a judgment regularly obtained after it had been entered or an order after it has been drawn up, except under the slip rule, so far as is necessary to correct errors in expressing the intention of the court, unless it is a judgment by default or made in the absence of a party at a trial or hearing: G

(3) if a judgment or order has been obtained by fraud or where further evidence which could not possibly have been adduced at the original hearing is forthcoming, a fresh action will lie to impeach the original judgment; H

(4) in this case the learned judge had no jurisdiction to set aside his own order and the original order must be restored, leaving it to the respondent to take out a fresh action to set aside the order on the ground of fraud. I

[30] The Federal Court case of *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393 with a coram of Eusoff Chin Chief Justice, Mohd Azmi, Peh Swee Chin, Wan Adnan FCJJ and Gopal Sri Ram JCA settled the position of the law, once and for all. Badiaddin laid down two limited exceptions to

A the law of res judicata when a final order of the High Court regularly obtained can be set aside:

(a) where there has been a breach of the rules of natural justice following the Privy Council case of *Isaacs v Robertson* [1985] AC 97; and

B (b) when the order is illegal for contravention of any written law or substantive statutory provision or lack of jurisdiction and it is ideal to reproduce the speech of Mohd Azmi FCJ at p 409 of the report:

> For my part, I must hasten to add that apart from breach of rules of natural justice, in any attempt to widen the door of the inherent and discretionary jurisdiction of the
C superior courts to set aside an order of court ex debito justitiae to a category of cases involving orders which contravened 'any written law', the contravention should be one which defies a substantive statutory prohibition so as to render the defective order null and void on ground of illegality or lack of jurisdiction.

But, both Madam Ong Peck Ha and Mr Ho Kee Tong implored this court to do
D justice and set aside the consent order. They relied on the following passage that appeared in *Badiaddin* where Mohd Azmi SCJ said at line 'I' of p 409 and they submitted that it constituted the third exception:

> It should not for instance be applied to a defect in a final order which has contravened a procedural requirement of any written law. The discretion to invoke the inherent
E jurisdiction should also be exercised judicially in exceptional cases where the defect is of such a serious nature that there is a real need to set aside the defective order to enable the court to do justice.

Dato' Pathmanathan, quick on the uptake, pointed out that here the consent order was not defective and so there was no necessity to set aside the said order. In my
F judgment, save and except for the above exceptions, a final order or a fortiori a perfected consent order cannot be challenged in collateral proceedings.

[31] Again in *Badiaddin's* case, Peh Swee Chin FCJ writing a separate judgment had this to say of a consent order (see pp 418–419 of the report):

G

> The grounds referred to for setting aside a consent order of a judgment by consent are grounds which basically relate to consensus ad idem or the free consent of parties to a binding agreement or contract. It is elementary that if it is proved that there are grounds which vitiate such free consent, the agreement is not binding. Now a consent order or a judgment by consent is undoubtedly based on an agreement of both parties where consent
H to the agreement must or should have been free in the first place. If the agreement upon which a consent order or judgment by consent is based is vitiated by any ground recognised in equity as vitiating such free consent, such as fraud, mistake, total failure of consideration (see *Huddersfield Banking Co Ltd v Henry Lister & Sons* [1895] 2 Ch 273 and the cases cited therein), then such a perfected consent order or judgment by consent could be set aside in a fresh action filed for the purpose. Grounds which would vitiate such free consent should
I also include misrepresentation, coercion, and undue influence and other grounds in equity.

[32] Peh Swee Chin FCJ placed a high premium on the case of *Hock Hua Bank v Sahari bin Murid* and his Lordship unhesitatingly put that case on a high pedestal when his Lordship said in *Badiaddin* at p 420 of the report:

I had considered and decided that the clear ratio in the Hock Hua Bank's case ought, on no account, to be departed from for dealing with the most unsatisfactory situation even though we were persuaded to do so on the ground of illegality on the argument based on the said Enactment. In other words, the said previous order should not be reopened and heard again on merits vide the ratio of *Hock Hua Bank v Sahari bin Murid* after it was perfected and also on the ground of res judicata in any event. The second order of sale had to be got rid of, but only if there was some other legal basis for doing so. There was happily such a basis as follows.

[33] The Court of Appeal case of *Selvam Holdings (M) Sdn Bhd v Grant Kenyon & Eckhardt Sdn Bhd*; *BSN Commercial Bank (M) Bhd & Ors, Interveners* [2000] 3 CLJ 201 followed the ratio decidendi of the Federal Court's case of *Badiaddin*. In *Selvam's* case, the Court of Appeal held that the interveners could apply in the same proceedings to intervene because they were an interested party and the order obtained was in breach of their rights. *Selvam's* case was a case of a breach of natural justice. With respect, when the plaintiffs relied on the following passage as found in *Selvam's* case at p 24 of the report which reads as follows:

Badiaddin's case, we say, extended the scope and extent of the inherent and discretionary jurisdiction of a court with unlimited jurisdiction to set aside an earlier order in the following two circumstances:

it wrongly misquoted *Badiaddin's* case. It must be emphasised that *Badiaddin's* case repeatedly spoke of 'a court of unlimited jurisdiction' and not 'a court with unlimited jurisdiction' and the distinction is quite significant (see p 425 to p 429 of the report to the *Badiaddin's* case).

[34] In *Khaw Poh Chhuan v Ng Gaik Peng & Ors* [1996] 1 MLJ 761, a Federal Court case, the court was concerned with the appellant who was not a party to the settlement agreement which finally culminated in a consent order. The appellant brought a fresh action on the basis that his rights as a non-party cannot bind him. That was a case of a breach of natural justice. Peh Swee Chin FCJ, delivering the judgment of the Federal Court, aptly said at p 782 of the report:

It is well established that a perfected consent order can only be set aside in a fresh action filed for the purpose (see eg *Huddersfield Banking Co Ltd v Henry Lister & Sons Ltd* (1895) 2 Ch 273). The consent order was given in originating summons No 209/1973. It is now sought to have it set aside in the subsequent and separate civil suit concerned in the instant appeal. The civil suit is of course the fresh action for the purpose of setting aside the consent order.

The Federal Court case of *Tio Chee Hing v Tractors Malaysia Bhd* [1973] 1 MLJ 66, the High Court case of *Ng Kee Lin v Ooi Soon Eng* [1978] 1 LNS 132 and the Court of Appeal case of*Yee Seng Plantations Sdn Bhd v Kerajaan Negeri Terengganu & Ors* [2000] 3 MLJ 699 were all cases where fresh actions were instituted. Gopal Sri Ram JCA in *Yee Seng Plantations* had this to say at p 713 of the report

Further, we agree with the submission of the respondents that a consent order may be set aside in a fresh action on the same grounds on which an agreement may be set aside. If authority is required for this proposition, it is to be found in the decision of the Federal Court in *Khaw Poh Chhuan v Ng Gaik Peng* [1996] 1 MLJ 761. However, whether an action to impeach a consent judgment in a former action will succeed must depend upon the facts

of the particular case. And, as we have already said, the respondents in the present instance have not made out a case to impeach the judgment in the first action.

I am bound by the decision of the Federal Court in *Badiaddin*. It was correctly decided and I too applied it vigorously in *Panglima Aces Sdn Bhd v Highway Brick Works (Serendah) Sdn Bhd* [2006] 3 CLJ 628.

[35] It is not even the contention of the applicants in encl 74F that the consent order was made in breach of the rules of natural justice or that the consent order is unlawful in that it was in breach of an express statutory provision or that this court had no jurisdiction to record the consent order. Not one of the ten grounds stated in the summons in chambers in encl 74F is predicated on either of the two exceptions as stated in *Badiaddin*. In the premises, it is my judgment that encl 74F is wanting, ill-conceived and must fail in limine.

[36] Enclosure 74F is an afterthought calculated to scuttle and bring to nought the consent order that was entered into with full knowledge of its effect and consequences. At this juncture, it is perhaps ideal to refer to the case of *Australian Broadcasting Commission v Australasian Performing Right Association Limited* [1973] 129 CLR 99, a decision of the High Court of Australia with a coram of Barwick CJ, Gibbs and Stephen JJ. That was a case involving a written agreement where the court had to interpret the intention of the parties in order to give effect to the contract. The decision of Gibbs J, makes for an interesting reading material and it stipulates the kind of approach that I should be adopting. There at pp 109–110, Gibbs J, had this to say:

> It is trite law that the primary duty of a court in construing a written contract is to endeavour to discover the intention of the parties from the words of the instrument in which the contract is embodied. Of course the whole of the instrument has to be considered, since the meaning of any one part of it may be revealed by other parts, and the words of every clause must if possible be construed so as to render them all harmonious one with another. If the words used are unambiguous the court must give effect to them, notwithstanding that the result may appear capricious or unreasonable, and notwithstanding that it may be guessed or suspected that the parties intended something different. The court has no power to remake or amend a contract for the purpose of avoiding a result which is considered to be inconvenient or unjust. On the other hand, if the language is open to two constructions, that will be preferred which will avoid consequences which appear to be capricious, unreasonable, inconvenient or unjust, 'even though the construction adopted is not the most obvious, or the most grammatically accurate', to use the words from earlier authority cited in *Locke v Dunlop* (1888) 39 Ch D 387, at p 393, which, although spoken in relation to a will, are applicable to the construction of written instruments generally; see also *Bottomley's Case* (1880) 16 Ch D 681 at p. 686. Further, it will be permissible to depart from the ordinary meaning of the words of one provision so far as is necessary to avoid an inconsistency between that provision and the rest of the instrument. Finally, the statement of Lord Wright in *Hillas & Co Ltd v Arcos Ltd* (1932) 147, LT 503, at p 514, that the court should construe commercial contracts 'fairly and broadly, without being too astute or subtle in finding defects", should not, in my opinion, be understood as limited to documents drawn by businessmen for themselves and without legal assistance (cf. *Upper Hunter County District Council v Australian Chilling and Freezing C Ltd* [1968] 118 CLR 429, at p 437.

[37] This would be followed by the case of *White & Carter (Councils) Ltd v McGregor* [1961] 3 All ER 1178, a decision of the House of Lords with a coram of Lord Reid, Lord Morton of Henryton, Lord Tucker, Lord Keith of Avonholm and Lord Hodson and there the court was concerned with a repudiation of a contract and the right of the innocent party to perform the contract and to enforce the contractual right thereunder. The speech of Lord Hodson merits reproduction (see p 1193 of the report):

> It may be unfortunate that the appellants have saddled themselves with an unwanted contract causing an apparent waste of time and money. No doubt this aspect impressed the Court of Session but there is no equity which can assist the respondent. It is trite that equity will not rewrite an improvident contract where there is no disability on either side. There is no duty laid on a party to a subsisting contract to vary it at the behest of the other party so as to deprive himself of the benefit given to him by the contract. To hold otherwise would be to introduce a novel equitable doctrine that a party was not to be held to his contract unless the court in a given instance thought it reasonable so to do. In this case it would make an action for debt a claim for a discretionary remedy. This would introduce an uncertainty into the field of contract which appears to be unsupported by authority either in English or Scottish law save for the one case viz, *Langford & Co Ltd v Dutch* [1952] SC 15, on which the Court of Session [1961] SLT 144 founded its opinion and which must, in my judgment be taken to have been wrongly decided.

[38] Why should I 'remake or amend' the consent order 'for the purpose of avoiding a result which is considere' by the vendors (referring to the plaintiffs, the fifth and the seventh defendants) who are the applicants in encl 74F 'to be inconvenient or unjust' (to borrow the words of Gibbs J, in the Australian Broadcasting Commission)? There is certainly 'no equity which can assist' the applicants in encl 74F and I cannot 'rewrite an improvident contract' (to borrow the words of Lord Hodson in *White & Carter*) for the benefit of the applicants. I am reluctant to do so because the words employed in the consent order are clear and unambiguous. It is a clear abuse of the process of this court when the applicants filed encl 74F. Mildly put, the application is frivolous, vexatious, untrue, wild, unfounded, unsubstantiated, imaginary and a mere ipsi dixit. They are irrelevant and immaterial in law. It must be denied by this court. The best recourse for the applicants vendors would be to institute a fresh action against Henry Butcher and KPMG or whosoever they have a cause of action for redress of their grievance. The application in encl 74F is bereft of merit and it is calculated to frustrate a consent order whose sole function was for the vendors (referring to the plaintiffs, the fifth and the seventh defendants) to sell their shares to the second defendant (Koh Heng Jin Holdings Sdn Bhd) at the price determined by Henry Butcher and calculated by KPMG. I must give effect to the intention of the parties as expressed in the consent order (*Australian Broadcasting Commission v Australasian Performing Right Association Limited*).

IS THE CONSENT ORDER EXECUTORY?

[39] It is argued by Madam Ong Peck Ha that the consent order is 'executory' because there are other matters to be done by both the vendors (referring to the plaintiffs, the fifth and the seventh defendants) and the second defendant as the purchaser before the consent order is said to be 'executed' She relies on the following

A passage found in M*ozley & Whiteley's Law Dictionary* (10th Ed), ER Hardy Ivamy where the words 'executed' and 'executory' are defined in this manner (see p 172 of the report):

> These words are used in law in a sense very nearly equivalent to past (or present) and future respectively. Thus, (1) A contract may be either executed, eg if A and B agree to exchange horses, and they do it immediately; here the possession and the right are transferred together; or executory, eg if they agree to exchange next week; here the right only vests, and their reciprocal property in each other's horse is not in possession but in action; for a contract executed, which differs nothing from a grant, conveys a chose in possession; a contract executory conveys only a chose in action.

[40] She too relies on the judgment of Lai Kew Chai J in *Bernard Rada & Lee v Concrete Innovators Co Pte Ltd & Anor* (1995) 2 SLR 143 where his Lordship said:

> In deciding the way I did, I invoked the equitable principle that where the consent order or judgment is still executory, the court may refuse to inforce it if it would be inequitable to do so: *Thwaite v Thwaite* [1981] 3 WLR 96, applying *Mullins v Howell* (1879) 11 Ch D 763, per Jessel MR, and *Purcell v FC Trigell* [1971] 1 QB 358. Ormrod LJ in at p 102 put the position very clearly in the following terms:
>
> Where the order is still executory, … and one of the parties applies to the court to enforce the order, the court may refuse if, in the circumstances prevailing at the time of the application, it would be inequitable to do so: Where the consent order derives its legal effect from the contract, this is equivalent to refusing a decree of specific performance; where the legal effect derives from the order itself the court has jurisdiction over its own orders: per Sir George Jessel MR.

[41] She argues that the parties had agreed to be bound by the valuation report of Henry Butcher and the accountant's report by KPMG in order to arrive at the respective purchase price. She submits that Henry Butcher had grossly undervalued the oil palm estates of St Andrew Estate (1986) when compared to the valuations done by Colliers Jordan and the Inland Revenue. It is for this reason that she urges this court to invoke the equitable principle not to enforce the consent order which is still executory. It is submitted that it would be most inequitable and unjust for the vendors (referring to the plaintiffs and the fifth and seventh defendants) to settle the long standing family dispute to its final conclusion when they would be suffering further losses. In *Abdul Razak Valibhoy & Anor v Abdul Rahim Valibhoy & Ors* [1995] 2 SLR 555, the parties agreed to partition land without any indication as to how and in what way the partition would be effected. The respondents applied for the land to be partitioned or alternatively that their interests in the land or the land itself be sold. The Singapore's Court of Appeal ruled that the jurisdiction of the court could be invoked for this purpose.

[42] Dato' Pathmanathan submits that it is not correct nor true to say that the consent order is a conditional sale. According to him, the fact that the vendors (referring to the plaintiffs, the fifth and the seventh defendants) agree to sell their shares in the St Andrew Estate (1986) and the second defendant as the purchaser agrees to buy is settled. He too says that the manner and the parties who shall determine the price at which the sale is to be effected is also settled. He says that there

is nothing left for the parties to agree. He says that the vendors (referring to the plaintiffs, the fifth and the seventh defendants) cannot now blow hot and cold. I agree totally with him.

INTERFERENCE BY THE SECOND DEFENDANT PURCHASER

[43] The first defendant (Koh Heng Jin @ Koh Heng Leong) as a businessman and as a director of the second defendant's company affirmed an affidavit on 15 August 2006 as seen in encl 74M and there he denied the unfounded, unsubstantiated and the scurrilous allegations that the reports by Henry Butcher and KPMG are flawed, not independent and influenced by Koh Peng Guan. This was what the first defendant averred at paras 18 and 21 of the affidavit in encl 74M:

> 18. The plaintiffs and the 5th and 7th Defendants/Applicants' allegations that the Valuation and Accountants Reports are flawed, not independently conducted and influenced by one Koh Peng Guan are untrue, preposterous and hence denied. Even if so, which is strenuously denied, the plaintiffs, and 5th and 7th Defendants/Applicants' recourse is through a fresh action.
>
> 21. My son Koh Peng Guan is not a party to these proceedings in any of these suits and any allegation that he influenced Henry Butcher or KPMG is scurrilous and in bad faith. Someone had to give the valuer Henry Butcher access to the estates and show them the boundaries. As Koh Peng Guan was not a party, speaks English and knows the boundaries of the subject properties his assistance was enlisted merely to showing Henry Butcher the subject properties and no more.

[44] It is the stand of the vendors (referring to the plaintiffs, the fifth and the seventh defendants) that Henry Butcher and KPMG have been influenced by Koh Peng Guan. This gentleman is also the son of the first defendant. Both Koh Peng Guan and the first defendant are the directors and shareholders of their family company, namely, the second defendant (Koh Heng Jin Holdings Sdn Bhd). The Suruhanjaya Syarikat Malaysia's search (exh 'KSK-4' of encl 74K) shows the shareholdings of Koh Peng Guan and the first defendant in the second defendant (Koh Heng Jin Holdings Sdn Bhd). As a shareholder it is said that Koh Peng Guan is directly involved and has a pecuniary interest. As a director, Koh Peng Guan is deemed to represent the second defendant (Koh Heng Jin Holdings Sdn Bhd).

[45] The direct involvement of Koh Peng Guan can be seen in the valuation report of Henry Butcher itself. At p 2 of Henry Butcher's report, the following write-ups appear:

> The subject property was inspected and referenced on May 25 and 29, 2006, by Messrs Liew Chee Kong, Long Tian Chek and Low Khee Wah accompanied by Mr. Koh Peng Guan.

And Koh Peng Guan's name can also be seen at the last page of the 'Profit and Loss Account' of Appendix VI of Henry Butcher's report (see exh 'KSK-1' of encl 74K) where the following words appeared:

> ATTN: PENG GUAN Cost of Replanting For Fld OP 2006/125 Acres.

This would mean that Koh Peng Guan was in direct contact with Henry Butcher.

[46] In my judgment, para (iv) of the consent order gives leeway and allows Koh Peng Guan to show the location of the oil palm estates of St. Andrew Estate (1986) to Henry Butcher to enable the latter to prepare the valuation report. There is thus nothing objectionable for Koh Peng Guan to show the subject property at the time of inspection. Paragraph (iv) of the consent order states as follows:

> the first defendant shall extend full cooperation and assistance and grant the valuer access onto the Oil Palm Estates.

[47] There is not a scintilla of evidence to show that either Henry Butcher or KPMG were interfered with. The consent order requires the cooperation of the defendants. Henry Butcher and KPMG were working under tight time schedules and Koh Peng Guan merely showed Henry Butcher St Andrew Estate in order to facilitate their work. Otherwise the defendants would be guilty of breach. Simply because the plaintiffs perceived that the quantum of the valuation is below their expectations they have resorted to all sorts of wild, unfair and unreasonable accusations against all and sundry. The parties have bound themselves to accept the reports of Henry Butcher and KPMG. All other valuations are irrelevant and besides the point. This court must give effect to the intention of the parties as set out in the consent order.

RE-WRITING THE CONSENT ORDER

[48] The plaintiffs, the fifth and the seventh defendants and their counsel have embarked on an ill conceived no holds barred tirade against the first, second, third, fourth and sixth defendants as well as against Henry Butcher and KPMG. All their efforts are bereft of any substance. Their berating of the professionals is totally unfair. The terms of reference and parameters of Henry Butcher and KPMG were as stated in the consent order and no more. They are well settled and are non-appealable. They cannot be set aside. Yet the learned counsel for the plaintiffs invited this court to re-write the consent order by introducing new terms in the form of two options. The first option is for three surveyors to be appointed who will then sub-divide and demarcate the oil palm estates of St Andrew Estate (1986) to be parcelled out to the vendors (referring to the plaintiffs, the fifth and the seventh defendants). The second option is for the vendors and the second defendant as the purchaser to each appoint a valuer and for the valuers to be directed to value the oil palm estates of St Andrew Estate (1986) at not less than RM35,000 per acre and that the average of the valuation of the valuers would constitute the price at which the second defendant would pay the vendors (referring to the plaintiffs, the fifth and the seventh defendants). If it is now open to the plaintiffs and the defendants to each produce their own reports from other valuers and accountants in order to give a fresh valuation higher than that as determined by Henry Butcher and KPMG, then why must there be a necessity to record a consent order?

[49] With respect, to re-write the consent order in accordance with the two suggested options would make a mockery of the consent order dated 22 May 2006. It is asking this court to mutilate the consent order and to re-write the existing

consent order on the terms as dictated by the vendors (referring to the plaintiffs, the fifth and the seventh defendants). This the court cannot do and this court will not accede to it. This court must hold the parties bound by the consent order and this court cannot re-write the consent order at the behest of one party because it wishes to renege and resile. The function of this court is to give effect to the consent order.

[50] It must be borne in mind that Henry Butcher and KPMG did not file any affidavits because they are not parties to these proceedings and they have not been served with the vendors' affidavits which contained unwarranted and disparaging allegations. Indeed if there is any truth whatsoever in any of the vendors' allegations they should not hesitate to institute legal proceedings against Henry Butcher, KPMG, the first defendant and Koh Peng Guan for inducing a breach of contract. In fact, the first, second, third and sixth defendants challenged the vendors (referring to the plaintiffs, the fifth and the seventh defendants) to institute legal proceedings against them. The vendors (referring to the plaintiffs, the fifth and the seventh defendants) could have demonstrated their bona fides by subpoenaing Henry Butcher and KPMG and cross-examining them. The vendors (referring to the plaintiffs, the fifth and the seventh defendants) are legally represented and they know their rightful legal remedies. What are they waiting for?

[51] In my judgment, the present exercise in encl 74F constitutes a delaying tactic and it is clearly an abuse of the process of this court. The plaintiffs have openly admitted that their application in encl 74F was filed because the value determined by Henry Butcher and the price determined by KPMG were far below their expectations and were unpalatable.

CONCLUSIVE DETERMINATION

[52] The parties had freely and voluntarily and with knowledge of the consequences agreed that the valuation report and the accountant report shall be 'the conclusive determination of the respective purchase price to be paid by the purchaser to each of the vendors (see paragraph (vii) of the consent order) and the courts have consistently given effect to such conclusive determination clause. This case stands on a stronger platform than those cases where by contract it is stated that a certificate or statement by an officer of a litigant bank certifies that some amount or account as correct shall be conclusive evidence of the stated sum. Here, the certification or determination is not by an officer of the defendants or the plaintiffs but rather by an independent professional jointly chosen and appointed by the parties. Here too the determination is agreed to be the price at which the shares are to be purchased and not merely evidence of the price. In *Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor* [2006] 2 MLJ 685, the Federal Court ruled that a certificate of indebtedness to be conclusive and there was no need for the plaintiff there to adduce proof of debt. In deciding the way it did, the Federal Court relied on, inter alia, the following cases:

(i) *Dobbs v The National Bank of Australasia Limited* (1935) 53 CLR 643 (where a clause in a guarantee given to a bank provided that a certificate signed by the

manager of the office at which the principal debtor's account was kept should be conclusive evidence of his indebtedness at a particular date and the court gave effect to it);

(ii) *Citibank NA v Ooi Boon Leong & Ors* [1981] 1 MLJ 282, (there the respondents were bound under the contract of guarantee to accept the certificate of indebtedness duly executed by the vice-President of the bank as conclusive evidence of the debt due to the bank and on this basis the court gave summary judgment to the bank); and

(iii) *D & C Nomura Merchant Bankers Bhd v Gunung Kuari Sdn Bhd & 3 Ors* [1990] 2 CLJ 58 (where the parties agreed that a certificate of indebtedness by an authorised officer of the plaintiff shall be binding and conclusive against the guarantors of the amount payable by the principal borrower and the court held that such a certificate to be binding unless there was manifest error).

[53] I must accordingly give effect to the conclusive determination clause as set out in the consent order. The advice of Lord Denning MR in*Bache & Co (London) Ltd v Banque Vernes Et Commerciale De Paris SA* [1973] 2 Lloyd's Law Reports 437 merits reproduction:

> I would only add this: this commercial practice (of inserting conclusive evidence clauses) is only acceptable because the bankers or brokers who insert them are known to be honest and reliable men of business who are most unlikely to make a mistake. Their standing is so high that their word is to be trusted. So much so that a notice of default given by a bank or a broker must be honoured. It ranks as equivalent to, if not higher than, the certificate of an arbitrator or engineer in a building contract. As we have repeatedly held, such a certificate must be honoured, leaving any cross-claims to be settled later by an arbitrator. So if a banker or broker gives a notice of default in pursuance of a conclusive evidence clause, the guarantor must honour it, leaving any crossclaims by the customer to be adjusted in separate proceedings.

In *Bangkok Bank Ltd v Cheng Lip Kwong* [1990] 2 MLJ 5, Yong Pung How J (as he then was) aptly said at p 8 of the report:

> The widespread use by banks of 'conclusive evidence' clauses has arisen simply because of the dictates of commerce, and has been supported by the assumption that money institutions, which are themselves closely regulated by the law, are completely honest and reliable.

Continuing on the same page, this was what his Lordship said:

> What is significant is that, in the absence of fraud or obvious error on the face of it, a certificate issued under a 'conclusive evidence' clause is conclusive of both the liability and the amount of the debt.

[54] The parties must be held to be bound by the clear terms and conditions of the consent order and they must not be allowed to resile from the same. The agreement of the parties are solemnly embodied in the consent order. The intention was quite explicit and clear. It was for the parties to be bound conclusively to the consent order.

This court will not allow the parties to treat the consent order with scorn and contempt. Neither would this court allow the parties to renege against the consent order with impunity and make a mockery of this court.

CONCLUSIONS

[55] For the reasons as adumbrated above, it is evident that the summons in chambers in encl 74F to set aside the consent order and to restore encl 59 (the plaintiffs' application pursuant to O 30 of the RHC) for hearing are misconceived in law. It defeats the aim and object of the consent order. The parties recorded the consent order with four salutary purposes in mind. It is to allow Henry Butcher to value the subject property and for KPMG to determine the sale price and for the parties to be bound by it and to give effect to it. Enclosure 74F is nothing more than an application to frustrate and scuttle the consent order. It is designed and calculated to ferment discord and agitate further litigation. It goes against the intention of the parties which was to settle the long outstanding disputes, once and for all.

[56] In order to give efficacy to the consent order, I must make certain consequential orders. I have to direct the senior assistant registrar to do certain things like what other judges before me have done. Thus, in *Kok Ek Chooi v Cheah Soon Neoh & Anor* [1982] 1 MLJ 219, the late Arulanandom J, directed the senior assistant registrar to execute the necessary transfer of the undivided shares to the land. In *Ooi Siew Yook & Ors v Lim Bar Kee* [1987] 2 MLJ 267, Edgar Joseph Jr J (who later rose to be a Supreme Court judge) varied a consent order to give it efficacy because a party to the consent order and to the cheque signatory refused to sign those cheques and his Lordship directed and authorised another person to sign in lieu of the recalcitrant party. Again, in *United Malayan Banking Corporation Bhd v Syarikat Perumahan Luas Sdn Bhd (No 2)* [1988] 3 MLJ 352, Edgar Joseph Jr J (who later rose to be a Supreme Court judge) directed the senior assistant registrar to do such acts in the event the chargor fails to comply.

[57] Accordingly, without hesitation, I dismiss the vendors' (referring to the plaintiffs, the fifth and the seventh defendants) application in encl 74F with costs to be taxed. I too confirm and adopt the respective purchase price as stated in Appendix 1 of the KPMG's report (as reproduced somewhere in this judgment) as the respective purchase price to be paid by the second defendant (Koh Heng Jin Holdings Sdn Bhd) as the purchaser to the vendors (referring to the plaintiffs, the fifth and the seventh defendants) by 16 January 2007.

[58] I too make the following consequential orders in order to give efficacy to the consent order

(a) that the senior assistant registrar be empowered and is hereby authorised to execute all documents as described in paragraphs (ix), (x) and (xiii) of the consent order dated 22 May 2006 on behalf of all or anyone of the vendors

(referring to the plaintiffs, the fifth and the seventh defendants) who fail to execute the said documents and have them delivered to the purchaser's solicitors Messrs M Pathmanathan & Co within two days from the date of this order; and

(b) that all the vendors (referring to the plaintiffs, the fifth and the seventh defendants) and/or any one of them personally, their agents, nominees and/or any beneficiary/beneficiaries under the estates as represented by the plaintiffs to facilitate the charge being created pursuant to paragraph (xii) of the consent order dated 22 May 2006 shall not lodge and/or create any further encumbrances, caveats and/or liens on the properties known as GM 27 Lot No 255, GM 28 Lot No 256, GM 29 Lot No 309, G 28029 Lot No 453, G 28030 Lot No 455 all in the Mukim of Batang Berjuntai and CT 22172 Lot No 1668, CT22173 Lot No 1669 and CT 22174 Lot No 1670 all in the Mukim of Ijok from the date of this Order; and

(c) that in the event it is found that there are any encumbrances, caveats and/or liens in the above described properties after the date of this Order which prevents the charge being created and/or the transfer of the partnership equity under the consent order dated 22 May 2006 the Senior Assistant Registrar is authorised and/or empowered to execute the relevant documents including but not limited to Form 19G of the National Land Code 1965 to remove any such encumbrance.

[59] For the sole purpose of giving efficacy to the consent order dated 22 May 2006, certain dates found in the body of the said consent order must be amended accordingly. Thus, para (viii) of the said consent order which reads:

all parties shall appear before the Honourable Court on 15 July 2006

to be substituted with the following date:

all parties shall appear before the Honourable Court on 16 October 2006

[60] That para (viii) of the said consent order which reads:

with effect from 15 July 2006 and expiring on 15 September 2006

to be substituted with the following dates:

with effect from 16 October 2006 and expiring on 16 January 2007

[61] That para (xi) of the consent order dated 22 May 2006 which reads:

on or before 18 July 2006

to be substituted with the following date:

on or before 19 October 2006

[62] That paragraph (xiv) of the consent order dated 22 May 2006 which reads: **A**

> on or before 18 July 2006

to be substituted with the following date:

> on or before 19 October 2006 **B**

[63] The vendors (referring to the plaintiffs, the fifth and the seventh defendants) are certainly bound by the doctrine of res judicata because the consent order has since been perfected and it is now binding and it operates as an estoppel by record (*Yee Seng Plantations Sdn Bhd v Kerajaan Negeri Terengganu & Ors*. According to *Halsbury's Laws of England* (4th Ed), Vol 37 at p 286: **C**

> On the other hand, once a consent judgment or order has been entered or passed, it cannot be set aside by the court of first instance in the original action, even if it was entered or passed by mistake (*Ainsworth v Wilding* (1896) 1 Ch 673, *Wilding v Sanderson* (1897) 2 Ch 534, A subsequent change in the law is not a sufficient reason for setting aside an order made by consent: *Chanel Ltd v FW Woolworth & Co Ltd* [1981] 1 All ER 745, (1981) 1 WLR 485, distinguishing *Regent Oil Co Ltd v JT Leavesley (lichfield) Ltd* [1966] 2 All ER 454, (1966) 1 WLR 1210), but it may be set aside or extended or altered with the consent of all the parties (*Australian Automatic Weighing Machine Co v Walter* (1891) WN 170), provided that to do so will not prejudice a third person (*Munster v Cox* (1885) 10 App Cas 680; *The Bellcairn* (1885) 10 PD 161, *Hammond v Schofield* (1891) 1 QB 453). **D** **E**

[64] Here, Dato' Pathmanathan's clients are challenging encl 74F and they are not agreeing to it. In the course of the protracted submissions, the fourth defendant was reported to have been voluntarily wound up and the said Dato' ceased to represent the fourth defendant. **F**

Order accordingly.

Reported by Sally Kee **G**

H

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